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5                   UNITED STATES DISTRICT COURT  
6                   WESTERN DISTRICT OF WASHINGTON  
7                   AT TACOMA

8 NICHOLAS J. CENCICH,

9                   Petitioner,

10                 v.

11 MAGGIE MILLER-STOUT,

12                   Respondent.

CASE NO. C10-5164 BHS

ORDER DENYING MOTION TO  
VACATE

13  
14                  This matter comes before the Court on Petitioner Nicholas J. Cencich's  
15 ("Cencich") motion to vacate (Dkt. 45). The Court has considered the pleadings filed in  
16 support of the motion and the remainder of the file and hereby denies the motion for the  
17 reasons stated herein.

18                  On March 3, 2010, Cencich filed a petition for habeas relief. Dkt. 7. On  
19 September 6, 2012, Magistrate Judge Karen L. Strombom issued a Report and  
20 Recommendations ("R&R") recommending denial of Cencich's petition, noting that  
21 objections to the R&R were due by September 21, 2012. Dkt. 40.

1 On September 25, 2012, after a complete review of the R&R and the remaining  
2 record and finding no objections, the Court adopted Judge Strombom's R&R denying  
3 Cencich's petition for writ of habeas corpus. Dkt. 41. On October 22, 2012, Cencich filed  
4 a notice of appeal regarding the Court's order adopting the R&R and the subsequently  
5 entered judgment (Dkts. 41 and 42). *See* Dkt. 44.

6 On November 30, 2012, Cencich filed a motion for relief from the Court's entry of  
7 judgment on the same orders he was appealing to the Ninth Circuit. Dkt. 46. On  
8 December 4, 2012, the Court entered an order striking Cencich's motion for relief from  
9 entry of judgment, finding that the Court was divested of jurisdiction due to the appeal  
10 filed by Cencich. *See* Dkt. 47. On December 19, 2012, the Ninth Circuit issued a  
11 mandate denying Cencich's certificate of appealability. Dkt. 49.

12 On September 23, 2013, Cencich filed the instant motion for relief from the  
13 Court's order striking his motion for relief from entry of judgment, requesting, in part,  
14 that the Court renote his "original FRCP Rule 60 motion to vacate the Court's order  
15 denying habeas relief" (*see* Dkts. 46 and 47). Dkt. 54 at 2.

16 As noted above, Cencich filed his "original" motion to vacate during the pendency  
17 of his appeal to the Ninth Circuit on the same orders he sought to vacate. Despite  
18 Cencich's contentions to the contrary, the Court neither had jurisdiction to hear his initial  
19 motion to vacate (Dkt. 46) nor was it required to wait for the issuance of the Ninth  
20 Circuit's mandate denying his request for a certificate of appealability to rule on a motion  
21 over which it clearly lacked jurisdiction. Dkt. 54 at 2-4. Furthermore, though Cencich  
22 insists that his objections have merit and were not heard, when the Ninth Circuit issued

1 the mandate denying Cencich's certificate of appealability, it found that pursuant to 28  
2 U.S.C. § 2253(c)(2) Cencich failed to make a substantial showing of the denial of a  
3 constitutional right. Dkt. 49. A petitioner must also demonstrate that reasonable jurists  
4 could debate whether, or agree that, the petition should have been resolved in a different  
5 manner or that the issues presented were adequate to deserve encouragement to proceed  
6 further. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Thus, it was Cencich's burden to  
7 include his objections to the R&R with his request for certificate of appealability to the  
8 Ninth Circuit, if he deemed them necessary to show that he was denied his constitutional  
9 rights such that his petition warranted further review. Whether he included those  
10 objections or not, the Ninth Circuit found that Cencich did not meet his burden and  
11 therefore denied his certificate of appealability.

12 Therefore, it is hereby **ORDERED** that Cencich's motion to vacate is **DENIED**.  
13 No further pleadings will be accepted in the matter.

14 Dated this 4th day of December, 2013.

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BENJAMIN H. SETTLE  
United States District Judge  
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